MOTION FILED
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No. 82-131

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

JONES & LAUGHLIN STEEL CORPORATION,

Petitioner,

v.

HOWARD E. PFEIFER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

RAYMOND J. CONBOY, ESQUIRE
POZZI, WILSON, ATCHISON, O'LEARY & CONBOY
910 Standard Plaza Building
1100 S. W. Sixth Avenue
Portland, Oregon 97204
(503) 226-3232

Attorneys for Amicus Curiae

QUESTION PRESENTED

1. Whether a longshoreman, who is receiving benefits under the Longshoremen's and Harbor Workers' Compensation Act, is entitled to maintain an action against his employer for negligence under § 905(b) of the LHWCA, when the employer is the owner or owner pro hac vice of the vessel upon which the longshoreman suffered his injuries.

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MOTION OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

The International Longshoremen's and Warehousemen's Union respectfully moves the Court for permission to file the accompanying Brief Amicus Curiae in support of Respondent, limited to a discussion of the first question presented by the brief of Petitioner, i.e.:

> "Whether a longshoreman, who is receiving benefits under the Longshoremen and Harbor Workers' Compensation Act, is entitled to maintain an action against his employer for negligence under Section 905(b) of the LHWCA, when the employer is the owner or owner pro hac vice of the vessel upon which the longshoreman suffered his injuries."

The International Longshoremen's and Warehousemen's Union (ILWU) is a labor organization with headquarters in San Francisco, California, which through its various locals represents approximately ten thousand longshoremen and marine clerks employed in maritime commerce on the waterfronts of California, Oregon,

Washington, Alaska, and Hawaii. In years past, the ILWU has cooperated with employer interests in mechanizing cargo operations on the West Coast waterfront, resulting in a substantial reduction of the work force and increased efficiency in stevedoring operations. Representatives of the ILWU participated in Congressional hearings and agreements which led to the enactment of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Those Amendments increased workmen's compensation benefits for maritime workers and to some extent limited remedies available to maritime workers in third party actions against vessels for personal injuries sustained in maritime employment.

The ILWU is concerned that this Court properly interpret the 1972 Amendments, so as not to restrict third party remedies available to longshoremen and other

harbor workers beyond the point intended by Congress.

Petitioner has refused to give consent to the filing of the accompanying brief of Amicus Curiae. Petitioner's brief, in arguing that a longshoreman should be precluded from maintaining an action against his employer for negligence when the employer is the owner or owner pro hac vice of the vessel upon which the longshoreman suffers injury, omits substantial portions of the legislative history of the 1972 Amendments, which make it clear that Congress intended to preserve the rule of Reed v. The Yaka, 373 U.S. 410 (1963), in a negligence context. The ILWU does not know to what extent Respondent intends to review the legislative history in his brief. The decision of the Court below does not discuss the legislative history.

The ILWU further wishes to discuss

briefly the undesirable consequences which a ruling in Petitioner's favor may have in West Coast ports of the United States. All of these matters are set forth at length in the brief which accompanies this motion.

Respectfully submitted,

By Raymond J. Conboy

RAYMOND J. CONBOY, ESQUIRE
POZZI, WILSON, ATCHISON,
O'LEARY & CONBOY
910 Standard Plaza Building
1100 S. W. Sixth Avenue
Portland, Oregon 97204
(503) 226-3232

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RAYMOND J. CONBOY, ESQUIRE
POZZI, WILSON, ATCHISON, O'LEARY & CONBOY
910 Standard Plaza Building
1100 S. W. Sixth Avenue
Portland, Oregon 97204
(503) 226-3232

Attorneys for Amicus Curiae

INTEREST OF AMICUS CURIAE

The International Longshoremen's and Warehousemen's Union (ILWU) is a labor organization with headquarters in San Francisco, California, which through its various locals represents approximately ten thousand longshoremen and marine clerks employed in maritime commerce on vessels and docks in California, Oregon, Washington, Alaska and Hawaii. Representatives of the ILWU participated in Congressional hearings and agreements which lead to the enactment of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Those Amendments increased workmen's compensation benefits for maritime workers and to some extent limited remedies available to maritime workers in third party actions against vessels for personal injuries sustained in maritime employment.

The ILWU is concerned that this Court

properly interpret the 1972 Amendments to the LHWCA so as not to restrict third party remedies available to longshoremen and other harbor workers beyond the point intended by Congress.

Longshoring is one of the most dangerous occupations in the United States, ranking with mining in the frequency and severity of injuries sustained by employees. In enacting the 1972 Amendments to the LHWCA, Congress preserved a negligence remedy. The Committee Reports accompanying the legislation recognize that "[p]ermitting actions against the vessel based on negligence will meet the objective of encouraging safety* * *." Report of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Report No. 92-1125, page 10; Report of the House Committee on Education and Labor, 92d Cong., 2d Sess., Report No. 92-1441, page 6. Petitioner seeks to bar long-

shoremen who are receiving benefits under the LHWCA from maintaining an action against the employer when the employer is the owner or owner pro hac vice of the vessel upon which the longshoreman suffered his injuries. This effort is contrary to Congressional intent as expressed both in the 1972 Amendments and accompanying Senate and House Committee Reports.

The ILWU appears as Amicus Curiae in this proceeding as a spokesman for the many thousands of waterfront employees which it represents through its local unions in West Coast ports. The ILWU is obligated to protect the working conditions and legal rights of its members whenever, as in the present case, those working conditions and rights have been subjected to challenge.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are Sections 905(a) and (b) of the Longshoremen's and Harbor Workers' Compensation Act, reproduced below.

> "(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the

risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

SUMMARY OF ARGUMENT

The legislative history of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (S. 2318, Public Law 92-576) makes it clear that Congress, in enacting the 1972 Amendments to the LHWCA, intended to preserve the rule of Reed v. The Yaka, 373 U.S. 410 (1963) in a negligence context. The Report of the Senate Committee on Labor and Public Welfare which accompanied the Amendments referred specifically to Reed v. S.S. Yaka, 373 U.S. 410 (1963) and stated: "[T]he rights of an injured longshoreman or shipbuilder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the Bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence

of persons engaged in performing longshoring services. Similar provisions are applicable to shipbuilding or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or shipbuilders or repairmen as apply when an independent contractor employs such persons." Report of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Report No. 92-1125, pages 11, 12. The Report on the House Committee on Education and Labor contains virtually identical language. Report of the House Committee on Education and Labor, 92d Cong., 2d Sess., Report No. 92-1441, pages 7, 8.

Section 905(b), as enacted, embodies the intent of the Committee Reports. If the person injured is employed by the

vessel to provide stevedoring services, (i.e., a longshoreman), he is barred from a negligence action only "if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." If the person injured was a shipbuilder or repairman, he is barred only if "the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel."

All federal appellate courts which have considered the issue agree that the 1972 Amendments preserve Reed v. The Yaka. Indeed, this Court has expressly recognized, in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266 (1979), that this was the Congressional purpose.

Failure to give effect to Congressional intent would be likely to involve the federal courts in unravelling a variety of schemes devised to defeat negligence act-

ions permitted by Section 905(b). American flag lines can easily enter into arrangements to do their own stevedoring. Indeed, several such lines have in years past hired their own stevedore employees. Foreign flag vessels may well obligate stevedores to become "demise charterers" of their vessels while being loaded or discharged in the United States. Efforts of this kind have already been attempted in West Coast ports.

ARGUMENT

1. The 1972 Amendments to the Longshoremen's and Harbor Workers' Act, as embodied in 33 USC 905(b), were intended to preserve the rule of Reed v. The Yaka in a negligence context.

Petitioner characterizes Respondent Howard Pfeifer as a "longshoreman." Amicus curiae will accept that characterization, although Mr. Pfeifer's employment as a coal barge "landing helper" appears to be of that nebulous character which would with equal facility permit him to be categorized as a Jones Act seaman or harbor worker.

Prior to the effective date of the 1972 Amendments to the Longshoremen's and Harbor Workers' Act, 33 U.S.C § 901 et seq, a longshoreman had a right to bring an action against his own employer, in spite of the exclusive remedy provisions of the LHWCA, for violation of the

warranty of seaworthiness. That right was established in Reed v. The Yaka, 373 U.S. 410 (1963). While Reed was an in rem proceeding, the cause of action against the employer was quickly converted into an in personam remedy. Jackson v. Lykes Bros. Steamship Co., Inc., 386 U.S. 731 (1967).

In 1972, Congress amended the LHWCA to increase workmen's compensation benefits and eliminate the warranty of seaworthiness. The Amendments preserved a remedy against vessel owners and operators based upon negligence. Congress specifically addressed the rule of Reed v. The Yaka in the Amendments and accompanying Committee Reports. Petitioner has failed to cite to this Court the applicable portions of the reports of the Senate Committee on Labor and Public Welfare and House Committe on Education and Labor which make it clear that Con-

gress intended to preserve the rule of Reed v. The Yaka in actions based upon negligence.

Senator Eagleton, a co-sponsor of the Amendments, submitted a "do pass" Report of the Senate Committee on Labor and Public Welfare accompanying the Bill. The Report, No. 92-1125, 92d Cong., 2d Sess., states (at page 11):

> "The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or shipbuilder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in Reed v. S. S. Yaka, 373 U.S. 410 (1963) and Jackson Lykes Bros. Steamship Co., 386 U.S. 731 (1967), held that the unseaworthiness remedy is available to the injured longshoreman. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or an independent contractor. Accordingly, the Bill provides in the case of a longshoreman who is employed directly by the vessel there will

be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons."

In a section-by-section analysis, the Report continued as follows (page 25):

"If the employee was employed by the vessel to provide stevedoring services and his injury was caused by the negligence of other persons providing stevedoring services to the vessel, action against the vessel would be barred. Similarly, if the employee were employed by the vessel to provide shipbuilding or repair services and his injury were cause by the negligence of other persons providing such services to the vessel, such an action would be barred. Actions under this section cannot be based on the doctrine of seaworthiness and actions provided for in this section would be the exclusive remedy against a vessel. Vessel would be defined as any vessel upon which or in connec-

> tion with which any person entitled to benefits suffers injury and including the vessel owner and others responsible for the operation of the vessel."

The Report of the House Committee on Education and Labor, No. 92-1441, 92d Cong., 2d Sess., is a carbon copy of the Senate report and contains identical language, both as to general principles (pages 7, 8), and section-by-section analysis. (page 22). The House Report refers to Reed v. The Yaka and Jackson v. Lykes Bros. Steamship Co., and states: "The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairman as apply when an independent contractor employs such persons." House Report, page 8.

The 1972 Amendments, as embodied in 33 U.S.C § 905(b), reflect the intent of Congress. Section 905(b) provides that in

the event of injury to a covered employee "caused by the negligence of a vessel", the employee "may bring an action against such vessel as a third party." The only limitation is as follows:

> "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel."

The term "vessel" is defined by 33 U.S.C § 902(21) as:

> "any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charterer, or bare boat charterer, master, officer, or crew member."

Thus, whatever might be the continued vitality of Reed v. The Yaka if considered apart from legislation, it is apparent that Congress has taken action to codify that decision in the 1972 Amendments. Recognizing that the relationship of employee, stevedore and vessel owner is normally tripartite, Congress has determined that rules governing the three-way relationship will apply even when the functions of stevedore and shipowner are combined in the same employer.

The Court has already recognized that this was the Congressional intent in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266 (1979), where the Court stated:

> "[I]t is necessary only to construe the second sentence [i.e., of 33 U.S.C § 905(b)] to permit a third-party suit against the vessel providing its own loading and unloading services when negligence in its nonstevedoring capacity contributes to the injury. The second sen-

> tence means no more than that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself."

2. All decisions of all federal appellate courts which have considered the question hold that the 1972 Amendments were intended to extend the rule of Reed v. The Yaka to harborworkers' actions based upon negligence.

Without exception, every Court of Appeals to have considered the question holds that the rule of Reed v. The Yaka, in a negligence context, has survived the 1972 Amendments and is applicable both to longshoremen and other harbor workers. Fanetti v. Hellenic Lines, Ltd., 678 F2d 424 (CA 2, 1982); Napoli v. Transpacific Carriers Corp., 536 F2d 505 (CA 2, 1976); Smith v. Eastern Seaboard Pile Driving Inc.,

604 F2d 789 (CA 2, 1979); Griffith v. Wheeling-Pittsburgh Steel Corp., 521 F2d 31 (CA 3, 1975); Richardson v. Norfolk Ship Building & Dry Dock Corp., 621 F2d 633 (CA 4, 1980); Chiasson v. Rogers Terminal & Shipping Corp., 679 F2d 410 (CA 5, 1982); Smith v. M/V Captain Fred, 546 F2d 119 (CA 5, 1977); Robertson v. Jeffboat, 651 F2d 434 (CA 6, 1981).

The only appellate court decisions which have held that a harbor worker may not bring an action against his employer for negligence, as contrasted with unseaworthiness, in the employer's capacity as a vessel owner or operator involved injuries arising before the enactment of the 1972 Amendments to the LHWCA. See Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 545 F2d 235 (CA 1, 1976); Arvidson v. Dilling-

ham Corp., 462 F2d 1 (CA 9, 1972).[1] However, as all of the post-1972 Amendment cases cited above recognize, the Amendments were intended to extend the rule of Reed v. Yaka to negligence actions.

3. Failure to follow Congressional intent would encourage vessel owners to try to defeat Section 905(b) negligence actions by spurious contractual arrangements or other subterfuge.

Most of the shipping in West Coast ports of the United States is carried on by vessels of foreign registry which are compelled to use American stevedores. However, there are still a few American flag lines operat-

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[1] In Buna v. Pacific Far East Lines, Inc., 441 F Supp 1360 (N.D. Calif., 1977) and Baker v. Pacific Far East Lines, 451 F Supp 84 (N.D., Calif., 1978), the Northern District of California declined to follow Reed v. Yaka. These decisions have not been followed elsewhere. See Harter v. Columbia Marine Lines, --- F Supp --- (D.Or., 1982, No. 81-728).

ing on the West Coast, and in years past, although not presently, these lines, American Mail Line, Ltd., (now American President Lines), and Lykes Bros. Steamship Co., have at various times and places contracted to do their own stevedoring. Jackson v. Lykes Bros. Steamship Co., 386 U.S. 731 (1967); American Mail Line, Ltd. v. Weaver, 408 F2d 674 (CA 9, 1969). A third west coast vessel operator, Matson Navigation Company, has employed longshoremen through a subsidiary, Matson Terminals Company. Huff v. Matson Navigation Co., 338 F2d 205 (CA 9, 1964). See also, Kanton v. Grace Line, Inc., 234 F Supp 409 (W.D. Wash., 1964), which indicates that a line no longer in business on the West Coast used the same arrangement. In the event that the rule of Reed v. The Yaka, were overturned, these and other American flag lines would be offered a reason to create corporate structures designed to

eliminate Section 905(b) negligence actions.

Furthermore, foreign steamship lines would be tempted to seek the same immunity by subterfuge. The most obvious technique is to compel a stevedore to contract to perform services traditionally performed by the vessel; that is, to make the stevedore, in practical effect if not in name, a "demise" or "bareboat" charterer of the vessel while the vessel is in port.[2] Contracts of that nature have been attempted. For example, in Meuler v. American President Lines, Ltd., (CA 9, No. 80318, unreported memorandum, January 18, 1982), the Ninth Circuit

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[2] "In this form, the charterer takes over the ship, lock, and barrel, and mans her with his own people. He becomes, in effect, the owner pro hac vice, just as does the lessee of a house and lot, to whom the demise charterer is analogous." Gilmore and Black, The Law of Admiralty (2d ed.) p. 194. See also, Reed v. S.S. Yaka, 373 U.S. 410, 412 (1963).

disposed of such an agreement in the following language:

> "It was not error to hold that the contract with the stevedore was inadmissable to prove that the stevedore had assumed responsibility for the condition of the ship. Under § 905 (b) a shipowner cannot by contract with a stevedore relieve itself of liability for its own acts of negligence."

To date, federal appellate courts have been unwilling to permit vessel owners to escape liability in Section 905(b) negligence actions by contractual delegation of the responsibility for safety. Lopez v. A/S D/S Svendborg, 581 F2d 319, 329 (CA 2, 1978). However, it is foreseeable that failure to follow the Congressional policy of preserving Reed v. The Yaka would be productive of voluminous litigation to determine the bona fides or mala fides of shipowner efforts to defeat negligence claims by altering the apparent status of employment relationships.

CONCLUSION

The Court should hold, pursuant to the intent of Congress in enacting the 1972 Amendments to the LHWCA, that a longshoreman or other harbor worker is entitled to maintain an action against his employer for negligence under Section 905(b) of the LHWCA, when the employer is the owner or owner *pro hac vice* of the vessel upon which injury occurs.

Respectfully submitted,

RAYMOND J. CONBOY, ESQUIRE
POZZI, WILSON, ATCHISON,
O'LEARY & CONBOY
910 Standard Plaza Building
1100 S. W. Sixth Avenue
Portland, Oregon 97204
(503) 226-3232

Attorneys for Amicus Curiae